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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

TYR SPORT, INC., a California  
corporation

Plaintiff,

vs.

WARNACO SWIMWEAR, INC. dba  
SPEEDO USA, a Delaware corporation;  
UNITED STATES SWIMMING, INC.,  
an Ohio corporation; MARK  
SCHUBERT, an individual; ERIK  
VENDT, an individual; and DOES 1  
through 10, inclusive,

Defendants.

**Case No.: SACV 08-00529 JVS  
(MLGx)**

**NOTICE OF MOTION AND  
MOTION BY DEFENDANT  
SPEEDO USA TO DISMISS  
COMPLAINT; MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF**

[Filed concurrently with Request  
for Judicial Notice]

Date: November 3, 2008  
Time: 1:30 p.m.  
Ctm: 2C

**MOTION TO DISMISS**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT** on November 3, 2008 at 1:30 p.m., or as soon thereafter as the matter can be heard, before the Honorable James V. Selna, in Courtroom 2C of the United States District Court, Central District of California, located at 411 W. Fourth Street, Santa Ana, California 92701, defendant Warnaco Swimwear, Inc. dba Speedo USA ("Speedo") will, and hereby does, move for an order dismissing the first through fourth and sixth through tenth claims for relief asserted in the Complaint by Plaintiff TYR Sport, Inc.<sup>1</sup>

This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that Plaintiff's first through fourth and sixth through tenth claims do not state a claim upon which relief can be granted against Speedo for the following reasons:

The First and Second Claims for Violations of the Sherman Act should be dismissed because TYR has failed to plead facts necessary to: define an appropriate relevant market; show that Speedo has done anything to foreclose competition in any relevant market; establish that it meets the stringent test in this Circuit for establishing antitrust liability based on a defendant's advertising and promotional statements; and show that it has suffered injury in fact and antitrust injury. The Third Claim for Violation of the Cartwright Act fails for the same reasons as the Sherman Act claims.

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<sup>1</sup> This motion refers to the claims for relief as they are numbered in the body of Plaintiff's Complaint. The claims are numbered differently on the cover page of the Complaint.

1 The Fourth Claim for False Advertising in Violation of the Lanham Act  
2 should be dismissed because the allegedly false statements identified by TYR are  
3 puffing and/or opinion and therefore are not actionable under the Lanham Act.

4 The Sixth Claim for Tortious Interference with Contractual Relations should  
5 be dismissed because Speedo is legally entitled to compete with TYR and the fact  
6 that an athlete chose Speedo's product over TYR's competing product cannot be the  
7 basis for civil liability.

8 The Seventh Claim for Tortious Interference with Prospective Economic  
9 Advantage should be dismissed because TYR has not identified any specifically  
10 identifiable economic interest lost.

11 The Eighth Claim for Trade Libel should be dismissed because the allegations  
12 identified by TYR are not actionable as puffing and/or opinion, and because TYR  
13 has not alleged specific damages.

14 The Ninth Claim for Unfair Business Practices should be dismissed because  
15 Plaintiff has not alleged (and cannot allege) illegal, fraudulent, or unfair acts or  
16 practices. The Ninth claim should also be dismissed because Plaintiff improperly  
17 seeks damages and punitive damages, which are not available under Section 17200  
18 of the Business and Professions Code.

19 The Tenth Claim for Injunctive Relief should be dismissed because it is not a  
20 claim; it is a remedy that must be pled in conjunction with a viable claim that will  
21 support equitable relief.

22 This Motion is based on this Notice of Motion, the accompanying  
23 Memorandum of Points and Authorities, the concurrently filed Request for Judicial  
24 Notice, the Complaint, the papers and records on file, and such further argument or  
25 evidence as may properly be presented to this Court.

26 This motion is made following the conference of counsel pursuant to Local  
27 Rule 7-3 which took place on June 13, 2008.  
28

1  
2 Dated: September 15, 2008

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION AND SUMMARY OF ARGUMENTS.**

Plaintiff TYR Sport, Inc.'s complaint is a legally defective attempt to use the antitrust and unfair competition laws to challenge Defendant Speedo USA's legitimate marketing of the Speedo LZR Racer Swimsuit. Since its debut in February 2008, the LZR Swimsuit has been the subject of substantial publicity, primarily because swimmers wearing it have set an unprecedented 71 world records, including numerous world records at the 2008 Beijing Olympic Games. In a transparent attempt to divert attention from the highly successful LZR product and the deluge of positive press surrounding it, TYR filed a meritless lawsuit, on the eve of the Summer games, attacking Speedo, United States Swimming, Inc., Mark Schubert (the coach of the U.S. Olympic swim team), and three-time Olympian, Erik Vendt. TYR claims that the Defendants have somehow stifled competition in the "market" for high-end competitive swimwear by favoring the LZR Swimsuit, not because it is a superior product (notwithstanding the results achieved by athletes wearing it), but because Speedo sponsors US Swimming and Coach Schubert is supposedly an undisclosed consultant for Speedo. All of TYR's claims against Speedo fail as a matter of law.

The antitrust claims fail because TYR's allegations do not establish anticompetitive behavior in either of the two "markets" alluded to by TYR: the "market" for sponsorship and promotional opportunities in competitive swimming, and the "market" for high-end competitive swimwear. It cannot be alleged that Speedo has foreclosed competition for sponsorship and promotional opportunities by negotiating contracts with US Swimming, coaches, and athletes that are legal – in fact approved of by the US Olympic Committee. TYR admits that it too has entered into similar sponsorship agreements; it just has not been as successful as Speedo. Given TYR's admissions, this defect is incurable. However, Even if the Court were

1 to ignore TYR's admission, TYR does not and cannot allege that Speedo's  
2 sponsorships have caused an anticompetitive effect in the separate "market" for  
3 competitive swimwear or any other cognizable antitrust market.

4 Nor does TYR allege any statements of fact by Coach Schubert or Speedo that  
5 would support claims for trade libel or false advertising under the Lanham Act. All  
6 of the supposedly false statements attributed to Defendants are non-actionable  
7 puffery. The fact that these statements are attributed to Coach Schubert, who is  
8 alleged to be an "undisclosed" consultant to Speedo, does not make them actionable  
9 statements of fact. Moreover, Coach Schubert's relationship with Speedo is  
10 disclosed in the very articles that TYR cites as the source of his supposedly false  
11 statements.

12 TYR's remaining claims are equally unavailing. Speedo is entitled to  
13 compete with TYR by any legitimate means, and therefore the fact that athletes are  
14 choosing the LZR Swimsuit over the TYR swimsuit cannot be the basis for claims of  
15 intentional interference. There is no liability under the unfair competition laws  
16 because the Complaint reveals that Speedo has not illegally stifled competition or  
17 made any misrepresentations; to the contrary, all of Speedo's alleged actions are  
18 legitimate and in furtherance of its right to compete. Finally, TYR's claim for  
19 injunctive relief is not a claim at all; it is a remedy. TYR must allege which of its  
20 various legally defective claims might support the purported remedy of injunctive  
21 relief.

22 The timing of the filing of the Complaint reveals that TYR's true motive was  
23 not to challenge supposedly anticompetitive behavior, but rather to garner for its  
24 own swimsuit pre-Olympic publicity that could not otherwise be generated by  
25 legitimate marketing efforts or performances by athletes wearing the TYR suit.  
26 When TYR's allegations are addressed under a Rule 12 analysis, each of its claims  
27 fails and this entire action should be dismissed.

## II. STATEMENT OF FACTS.

According to TYR's Complaint, TYR and Defendant Speedo are both engaged in the business of designing, manufacturing and selling swimwear and accessories. (Compl. ¶ 9.)

The equipment at issue in this action is swimsuits. In February 2008, in anticipation of the United States Olympic trials and the August 2008 Beijing Olympic Games, Speedo introduced its new LZR Racer Swimsuit with Fast Skin technology. (Req. For Jud. Notice Ex. A.) A few weeks prior to the introduction of the LZR Swimsuit, Plaintiff TYR introduced its new top-of-the-line swimsuit, the "Tracer Rise." (Compl. ¶ 26.)

Plaintiff TYR alleges that Defendant Speedo, in conjunction with Defendants US Swimming and Schubert, have restrained competition in the alleged market for high-end, competitive swimsuits, disparaged TYR's products, falsely advertised Speedo's products, and interfered with TYR's sponsorship contracts. TYR claims that the Defendants did so through Speedo's sponsorship of US Swimming, which is the "national governing body for the sport of swimming." (Id. ¶ 4.)

TYR contends that US Swimming, because of its relationship with Speedo, has restrained trade by not offering sponsorship opportunities to TYR and other competitors at US Swimming meets and other events, and not accepting TYR advertising in US Swimming's official publication, "Splash" Magazine. (Id. ¶¶ 11, 12.) TYR does not cite to any specific provision dealing with sponsorships under the Ted Stevens Act, U.S. Olympic Committee Rules, or any other law, rule, or regulation for a National Governing Body like US Swimming that suggests there is anything improper in Speedo's sponsorship of US Swimming or Schubert's conduct in his role as a Speedo consultant.

TYR also alleges that Speedo carried out its plan to restrain competition through Defendant Mark Schubert, who is the coach and general manager of the

1 United States Olympic Swim Team. (Id. ¶ 14.) According to TYR, Coach Schubert  
 2 allegedly exerted his influence on athletes and caused them to choose the Speedo  
 3 LZR Swimsuit over competing products. He supposedly did so by expressing his  
 4 opinions regarding the advantages of wearing the LZR Swimsuit in competition.<sup>1</sup>  
 5 Schubert's alleged statements are described by TYR in paragraph 16 of the  
 6 Complaint and generally reflect Coach Schubert's opinions that the LZR Swimsuit is  
 7 the best suit for elite swimmers. (Id. ¶ 16.)

8 TYR concedes that Coach Schubert's statements, if made directly by Speedo  
 9 or any other manufacturer, would not be actionable; rather, they would be  
 10 understood as marketing statements made in the hope of selling equipment. (Id. ¶  
 11 17.) TYR claims, however, that because the statements are made by Coach  
 12 Schubert, they are not marketing opinions but actionable statements of fact because  
 13 Coach Schubert holds a special position as US Swim Team coach and has allegedly  
 14 not disclosed that he is a consultant to Speedo. (Id.)

15 There is no allegation in the complaint that it is illegal or in any way improper  
 16 for Speedo to pay Coach Schubert as a consultant. Nor is there any allegation that  
 17 the select few "elite" athletes who would buy these expensive (\$500) swimsuits are  
 18 unaware of Coach Schubert's relationship with Speedo. As set forth in the articles  
 19 attached to Speedo's Request for Judicial Notice, Coach Schubert's relationship with  
 20 Speedo is no secret. When discussing the LZR Swimsuit, Coach Schubert has been  
 21 quoted as stating "I am not just saying this because they [Speedo] pay part of my  
 22 salary; I am all about performance and I believe in the product." (Req. For Jud.  
 23 Notice Ex. A.) During these press conferences, it has been noted that Coach  
 24

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25 <sup>1</sup> The success of the LZR swimsuit is well documented. Since its introduction,  
 26 71 world records were broken by athletes wearing the LZR swimsuit. (Req. For Jud.  
 27 Notice Exs. A, B.)

Schubert was wearing a shirt with a Speedo logo. (Id.) It has also been reported in the national media (and in press materials disseminated by Speedo) that Coach Schubert was a technical consultant involved in the development of the LZR Swimsuit. (Id. Exs. C, D.)

### **III. THE FIRST, SECOND AND THIRD CLAIMS FOR VIOLATIONS OF THE SHERMAN ACT AND CARTWRIGHT ACT SHOULD BE DISMISSED.**

The antitrust laws were enacted for “the protection of competition, not competitors.” Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). Here, faced with the competitive challenge of a breakthrough product, TYR seeks court protection from the tough realities of a competitor’s innovation. The antitrust laws are not to be so misused. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1064 (9th Cir. 2001).

To plead violations of the Sherman Act, a plaintiff must allege facts that are sufficient to create a plausible inference that the defendants have committed an antitrust violation. Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007). As demonstrated below, TYR has failed to do so under Sections 1 or 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. As a result, the Cartwright Act claim is also deficient. See Breakdown Servs., Ltd. v. Now Casting, Inc., 2007 WL 5159700, No. 05-6732, \*11-12 (C.D. Cal. Jan. 25, 2007) (summary judgment).

#### **A. TYR Fails to State a Claim Based on Speedo’s Sponsorship of US Swimming.**

##### **1. TYR has not alleged that Speedo’s agreement with US Swimming forecloses competition in any relevant market.**

Generously read, TYR’s antitrust claims have two elements: (a) as the sponsor of US Swimming, Speedo receives certain exclusive promotional benefits; and (b) Speedo and Schubert have allegedly made certain false statements



1 concerning the Speedo LZR Racer and have allegedly disparaged the TYR Tracer  
 2 Rise suit. TYR alleges that these “anticompetitive” activities in sponsorship,  
 3 promotion, and advertising – all of which occur in a “market” that TYR never  
 4 defines – have caused certain of its sponsored swimmers to “defect” to the Speedo  
 5 suit, and that these “defections” somehow impair its ability to sell its “high-end  
 6 competitive swimwear” in another, separate market. (Compl. ¶¶ 9, 13, 19, 33.)

7 In cases like this, where a plaintiff alleges that anticompetitive conduct in one  
 8 market (here some undefined market for promotion, advertising, or sponsorship of  
 9 elite swimmers) causes an anticompetitive effect in a separate market (the “market  
 10 for high-end competitive swimwear”), it is necessary to define both markets and  
 11 show how the conduct in the first market causes injury in the second. Alaska  
 12 Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 546 (9th Cir. 1991) (alleged  
 13 monopoly in airline reservation system used to restrain market for airline ticket  
 14 sales); Geneva Pharm. Tech. Corp. v. Barr Labs., 386 F.3d 485, 494, 506, 509 (2d  
 15 Cir. 2004) (exclusive supply agreement with monopoly provider of active ingredient  
 16 for pharmaceutical used to restrain trade in downstream market for  
 17 pharmaceuticals); Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568  
 18 (2d Cir. 1990) (alleged monopoly over magazine advertising used to restrain market  
 19 for nutrition supplements); LiveUniverse, Inc. v. MySpace, Inc., 2007-2 Trade Cas.  
 20 (CCH) ¶ 75,782, No. 06-6994, 2007 U.S. Dist. Lexis 43739, \*56 (C.D. Cal. June 4,  
 21 2007) (alleged monopoly in social networking sites used to restrain market in  
 22 advertising).



Thus, in addition to the basic elements for pleading a cause of action under Sherman Act Sections 1 and 2,<sup>2</sup> TYR must allege facts sufficient to: (a) define the market in which the exclusive sponsorship agreement between Speedo and US Swimming, and the other promotional activities complained of, operate; (b) show that the agreement and the other activities complained of foreclose TYR from obtaining advertising and promotion in that market; (c) define the market for competitive swimwear equipment, where TYR claims to be injured; and (d) demonstrate that the restriction in the advertising and promotion "market" has caused TYR to be injured in the swimwear market. Alaska Airlines, 948 F.2d at 542, 545-47 & n.12; Geneva Pharm., 386 F.3d at 495-96, 501-06. In addition, the injury TYR claims to have suffered must constitute antitrust injury. LiveUniverse, 2007 U.S. Dist. Lexis 43739, at \*50-51. TYR either fails to plead these elements of market definition and causation at all, or fails to do so with the factual allegations required in this Circuit.

**2. TYR does not define a relevant market for advertising or promotion or plead that it is foreclosed from such a market.**

For an exclusive agreement to violate Sherman Act Sections 1 or 2, it must foreclose access to a significant portion of a "relevant market." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring); Tampa

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<sup>2</sup> Section 1 requires: (1) a contract, combination, or conspiracy that (2) unreasonably restrains trade. Tanaka, 252 F.3d at 1062. Monopolization under Section 2 requires proving the defendant: (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained its monopoly power through exclusionary conduct. Am. Profl Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Profl Publ'ns, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997). Attempted monopolization under Section 2 requires: (1) a specific intent to monopolize a relevant market; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success. Alaska Airlines, 948 F.2d at 542.

1 Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35 (1961); Omega Envtl., Inc. v.  
 2 Gilbarco, Inc., 127 F.3d 1157, 1162-63 (9th Cir. 1997).

3 This analysis cannot even begin without first defining the relevant market. It  
 4 is the reason why defining the relevant market in the complaint is a prerequisite to  
 5 asserting most claims under Section 1 or 2 of the Sherman Act. Tanaka, 252 F.3d at  
 6 1063; Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101, 1104-05  
 7 (9th Cir. 1999) ("Proving injury to competition in a rule of reason case almost  
 8 uniformly requires a claimant to prove the relevant market and to show the effects  
 9 upon competition within that market.") (quotation omitted). Despite this basic  
 10 requirement, TYR has made no effort to define the market in which the US  
 11 Swimming sponsorship and Shubert's spokesperson relationship with Speedo  
 12 operate. This deficiency is fatal to TYR's claims and warrants dismissal under Rule  
 13 12(b)(6).

14 TYR must also plead facts showing that the promotional opportunities offered  
 15 by US Swimming exclusively to Speedo constitute such a large portion of the  
 16 relevant market that TYR is "frozen out" from purchasing advertising, promoting its  
 17 products, or sponsoring swimmers. Jefferson Parish, 466 U.S. at 45; see also  
 18 Geneva Pharm., 386 F.3d at 508-09. TYR has not done so and, even if allowed to  
 19 amend, cannot cure this defect because it has affirmatively pleaded that it is **not**  
 20 foreclosed from advertising, promoting, or sponsoring swimmers to endorse its  
 21 product. Specifically, TYR boasts that it sponsors more than **fifty** world-class  
 22 swimmers, including numerous Olympic medalists and World Champions. (Compl.  
 23 ¶ 25.) In the face of these allegations, any attempted amendment would be futile,  
 24 and the first, second, and third claims should be dismissed with prejudice.

1                   **3. TYR does not adequately plead a market for “high-end**  
 2                   **competitive swimwear.”**

3           TYR does attempt to define, and claims to be injured in, the market for “high-  
 4 end competitive swimwear and accessories such as goggles, swim caps, training  
 5 equipment, sport and warm-up suits, sold to competitive swimmers in the  
 6 professional, collegiate, high school and club ranks.” (*Id.* ¶ 9.) This kind of  
 7 conclusory market definition is legally insufficient at the pleading stage. In order  
 8 properly to allege a relevant product and geographic market in this Circuit, a  
 9 plaintiff must plead facts demonstrating that there are no other goods or services that  
 10 are reasonably interchangeable with those contained in the proposed relevant market,  
 11 and that the proposed geographic market is the area of effective competition in  
 12 which buyers can find alternative sources of supply. *Big Bear*, 182 F.3d at 1105.  
 13 Plaintiff’s Complaint contains no allegations regarding interchangeability or cross-  
 14 elasticity of demand, much less the underlying facts that would be necessary to  
 15 support a relevant market for “high-end competitive swimwear and accessories.”

16           Plaintiff’s definition of a relevant geographic market that is limited to “the  
 17 entire United States and its territories” is equally flawed. The Complaint lacks even  
 18 a conclusory allegation that in response to a price hike in competitive swimwear,  
 19 consumers would look only to manufacturers in the U.S., and that no new foreign  
 20 manufacturers would enter the market. This is especially significant since TYR  
 21 affirmatively identifies two foreign manufacturers – Adidas and Arena – which it  
 22 claims have “recently exited” the market. (Compl. ¶ 9.) Given TYR’s complete  
 23 failure to plead any facts in support of the defined market in which it claims to be  
 24 injured, its antitrust claims should be dismissed. *See Tanaka*, 252 F.3d at 1063; *Big*  
 25 *Bear*, 182 F.3d at 1105; *Los Angeles Mem’l Coliseum Comm’n v. NFL*, 726 F.2d  
 26 1381, 1393 (9th Cir. 1984).

1                   **4. TYR fails to allege how it is injured in the market for “high-**  
 2                   **end competitive swimwear.”**

3           TYR has also failed to plead facts showing that the exclusive relationship  
 4 between Speedo and US Swimming has injured TYR in its sale of competitive  
 5 swimwear. At most, TYR alleges that some of its sponsored swimmers – only one  
 6 of whom it identifies – chose to wear Speedo’s LZR Swimsuit for the Olympic trials.  
 7 (Compl. ¶ 33.) The decision by elite athletes to wear the LZR Swimsuit, however,  
 8 does not cause injury in the market for “high-end competitive swimwear.”<sup>3</sup> In other  
 9 words, notwithstanding TYR’s conclusory assertion of injury, nothing in its  
 10 Complaint explains how Speedo’s relationship with US Swimming, Coach  
 11 Schubert’s statements, and the “defection” of Eric Vendt affects TYR’s sale of  
 12 swimwear. This failure to allege any facts linking its claimed injury in the  
 13 swimwear market to Speedo’s alleged anti-competitive conduct is fatal to TYR’s  
 14 claim. Alaska Airlines, 948 F.2d at 545 (“It is clear that defendants’ control of their  
 15 [computerized reservations systems] did not give them the power to eliminate  
 16 competition in the downstream air transportation market.”); Geneva Pharm., 386  
 17 F.3d at 509.

18                   **5. TYR admits that it has suffered no antitrust injury.**

19           As mentioned at the opening of this section, the antitrust laws protect  
 20 competition, not competitors. To avoid the misuse of the antitrust remedy by  
 21 competitors seeking to avoid the rigors of competition, a plaintiff must show and  
 22 plead that the defendant’s conduct harms competition in the market and that the  
 23 plaintiff’s injury flows from that very harm to competition. Big Bear, 182 F.3d at  
 24 1102; LiveUniverse, 2007 U.S. Dist. Lexis 43739, at \*50-51 (“Harm to one or more  
 25 \_\_\_\_\_

26 <sup>3</sup> This is particularly true where US Olympic Committee rules mandate that an  
 27 athlete may choose his own equipment. (Req. For Jud. Notice Ex. E.)  
 28

1 competitors is not sufficient to constitute antitrust injury unless a plaintiff alleges  
2 harm to the competitive process.”)

3 Here, TYR alleges that it has “suffered antitrust injury because SPEEDO has  
4 acquired or maintained its dominant market position, at the expense of other  
5 competitors in the market.” (Compl. ¶ 34.) That is an allegation of injury to  
6 competitors – not competition. It is not covered by the antitrust laws. Brunswick  
7 Corp., 429 U.S. at 489.

8 **B. TYR Fails to State a Claim Based On Speedo’s and Schubert’s**  
9 **Promotion of the LZR Swimsuit.**

10 The second half of TYR’s antitrust claim is based on Shubert’s alleged  
11 statements praising the LZR Swimsuit and Speedo’s supposed false advertising to  
12 team dealers. Some circuits refuse to even recognize antitrust claims based on  
13 alleged false advertising or disparaging comments made by one competitor about  
14 another. See e.g., Sanderson v. Culligan Int’l Co., 415 F.3d 620, 623-24 (7th Cir.  
15 2005). While this Circuit will recognize such claims in limited instances, it is hardly  
16 surprising that the standard a plaintiff must meet to assert such claims is extremely  
17 high. Absent a high bar, every case involving comparative advertising or  
18 disparagement would be converted into a federal antitrust case. Accordingly, in this  
19 Circuit, “[w]hile the disparagement of a rival . . . may be unethical and even impair  
20 the opportunities of a rival, its harmful effects on competitors are ordinarily not  
21 significant enough to warrant recognition under § 2 of the Sherman Act.” Am.  
22 Prof’l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof’l Publ’ns, Inc., 108  
23 F.3d 1147, 1151 (9th Cir. 1997) (citation omitted).

24 To prove that disparaging statements constitute exclusionary conduct in  
25 violation of the Sherman Act, a plaintiff must overcome a presumption that their  
26 effect on competition was *de minimus*. Id. at 1152. Overcoming the presumption  
27 requires the plaintiff to plead and prove that the “representations were (1) clearly  
28

1 false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made  
 2 to buyers without knowledge of the subject matter, (5) continued for prolonged  
 3 periods, and (6) not readily susceptible of neutralization or other offset by rivals.”  
 4 Id. (quotation omitted). All six elements of the test must be satisfied. Id.

5 TYR has not even attempted to satisfy Harcourt. TYR alleges that Schubert  
 6 made statements that equipment (not identified as a TYR product) is “inferior” to  
 7 Speedo’s and that Speedo was “far ahead of all of its competitors on swimsuit  
 8 technology”; and that “[t]here is one manufacturer that’s put millions into research  
 9 while the others are more into fashion.” (Compl. ¶¶ 15, 16.) In addition, TYR  
 10 alleges that Speedo has distributed false or misleading advertising materials that  
 11 misrepresent performance statistics by omitting statistics for athletes using TYR  
 12 products. (Id. ¶¶ 31, 32.)

13 TYR has not alleged any facts to suggest that these statements were “clearly  
 14 false,” or “clearly material.” Nor has it pleaded that Shubert’s statements were made  
 15 “to buyers without knowledge of the subject matter.” TYR cannot possibly make  
 16 such an allegation here. The statements to which TYR objects were made to the  
 17 most sophisticated swimmers and coaches in the world. Indeed, on the final element  
 18 of the Harcourt test, TYR makes no attempt to satisfy its burden by offering an  
 19 account of any measure it could or did take to respond to, or to counteract,  
 20 Schubert’s and Speedo’s allegedly false, misleading, and disparaging campaign.

21 In short, TYR has utterly failed to satisfy the requirements of Harcourt.  
 22 Accordingly, its antitrust claims should be dismissed.

#### 23 **IV. THE FOURTH CLAIM FOR FALSE ADVERTISING FAILS BECAUSE** 24 **THE STATEMENTS ARE NOT ACTIONABLE.**

25 The Lanham Act prohibits any false or misleading description or  
 26 representation of fact about a product of an advertiser or competitor in commerce.  
 27 15 U.S.C. § 1125(a)(1). Statements amounting to “puffing” are “not the kind of  
 28



1 detailed or specific factual assertions that are necessary to state a false advertising  
 2 cause of action under the Act.” See Cook, Perkiss & Liehe, Inc. v. N. Cal.  
 3 Collection Serv. Inc., 911 F.2d 242, 245-47 (9th Cir. 1990) (affirming 12(b)(6)  
 4 dismissal without leave to amend because statement that “we’re the low cost  
 5 commercial collection experts” was puffery). Under the puffing doctrine,  
 6 “advertising which merely states in general terms that one product is superior is not  
 7 actionable.” Id. at 246 (quotation omitted); see also Coastal Abstract Serv., Inc. v.  
 8 First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999) (statement that  
 9 competitor was “too small” to handle business is mere puffery).<sup>4</sup>

10 Similarly, opinions are not actionable both because they are not statements of  
 11 fact, and because, even if false, they are protected expression under the First  
 12 Amendment. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“However  
 13 pernicious an opinion may seem, we depend for its correction not on the conscience  
 14 of judges and juries but on the competition of other ideas.”).

15 When viewed in light of the foregoing authorities, each of the allegedly false  
 16 statements is non-actionable opinion and/or puffery.

17 **A. The Statements Attributed To Schubert Are Not Actionable.**

18 In its Complaint, TYR erroneously characterizes as “false advertising” the  
 19 following statements by Schubert:

- 20 • ¶¶ 16(a), 16(b): Schubert “advocated the virtues of SPEEDO’s elite  
 21 swimsuit technology and the results at the 2007 World Swimming Championships  
 22 held in Melbourne, Australia,” presented a “segment advocating the upcoming new  
 23

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24  
 25 <sup>4</sup> Both Cook and Coastal Abstract relied upon the reasoning and holding in  
 26 Smith-Victor Corp. v. Sylvania Elect. Products, Inc., 242 F.Supp. 302, 308 (N.D. Ill.  
 27 1965). There, an advertiser’s statement that its lamps were “far brighter than any  
 28 lamp ever before offered for home movies” was mere puffery. Id.

1 SPEEDO LZR technology,” and stated that “SPEEDO was far ahead of all of its  
2 competitors in swimsuit technology.”

3 Coach Schubert’s advocacy of “the virtues” of “technology” is not a statement  
4 about a specific product that can be proven true or false. Nonspecific touting of the  
5 “virtues” of a competitive product is classic puffing because, among other things, it  
6 does not describe “specific or absolute characteristics of a product.” Similarly,  
7 Schubert’s claim that Speedo is “far ahead of its competitors” is clearly an opinion.  
8 It falls within the puffing doctrine because it is vague, subjective, and not susceptible  
9 to verification. It is no different from claiming generally to be “better than” the  
10 competition. See e.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898  
11 F.2d 914, 926 (3d Cir. 1990) (“better than” statements are the “most innocuous”  
12 kind of puffing).

13 • ¶¶ 16(c), 16(k): Schubert orally advocated that US Team members  
14 would have a “2% advantage” if they used the Speedo LZR.

15 A 2% “advantage” is not definite enough to be a factual representation. At  
16 first blush, this statement appears to refer to a concrete characteristic because it uses  
17 a number. In fact, however, it is non-actionable puffing because the number  
18 modifies a wholly vague and amorphous term – “advantage.” It cannot be  
19 determined from the statement whether the “advantage” is over competing products  
20 or over other Speedo products, or whether the advantage relates to speed, time, drag,  
21 flotation, energy used during an event, confidence, or any other of the innumerable  
22 potential “advantages” a product may offer.

23 This issue was addressed in CollegeNet, Inc. v. Embark.Com, Inc., 230 F.  
24 Supp. 2d 1167, 1177 (D. Or. 2001). There, the District Court found the statement  
25 that a college website “holds a 50% market share of the top United States  
26 universities” was non-actionable puffing. Id. The court reasoned that “[w]hile the  
27  
28



1 use of ‘50%’ is a concrete number, the phrase ‘top universities’ is too vague.” Id.  
 2 Here, the same is true for the term “advantage.”

3 • ¶ 16(d): Schubert has “label[ed] criticism a case of sour grapes  
 4 instigated by other swimsuit manufacturers.”

5 The alleged “criticism” to which Schubert refers in these articles is that the  
 6 LZR Swimsuit is too good and gives swimmers an unfair advantage. (Req. For Jud.  
 7 Notice Exs. A, C.) This statement, which is quoted in many news articles, is not a  
 8 representation of fact about any product and therefore cannot constitute false  
 9 advertising. Boule v. Hutton, 70 F. Supp. 2d 378, 388 (S.D.N.Y. 1999) (letter  
 10 repudiating artist catalog not a “representation of fact” under the Lanham Act  
 11 because “repudiation letter was not a statement of fact about anyone’s goods”). It is  
 12 unquestionably opinion and commentary on a matter of public interest. Thus, it is  
 13 absolutely protected from regulation by the First Amendment. See e.g., Gertz, 418  
 14 U.S. at 339-40.

15 • ¶¶ 16(e), 16(h), 16(l): Schubert stated that: (1) he “will tell his team to  
 16 wear Speedo at the US Trials”, (2) “we will go so far as to recommend every  
 17 American wear the Speedo suit at the Olympic trials in June . . . . even if they are  
 18 sponsored by another company”, and (3) “I would strongly advise them to wear the  
 19 [Speedo] swimsuit at trial, or they might end up at home watching on NBC.”

20 The fact that Coach Schubert stated that he would recommend Speedo is not a  
 21 false statement of fact. To the contrary, TYR alleges that it is true (but somehow  
 22 wrongful). Since each of these statements merely reflect what Coach Schubert  
 23 reportedly said he would do in the future, they are not actionable.

24 • ¶¶ 16(f), 16(g): Schubert stated that “US Swimmers who were using  
 25 another brand than Speedo had backed the wrong horse . . .”, and swimmers not  
 26 wearing Speedo suits “are contracted to an inferior product . . . .”  
 27  
 28

Again, these statements are classic opinions. Whether a swimmer “backed the wrong horse” cannot be proven true. See e.g., Global Telemedia Int’l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (statement that company is a “sinking ship” is opinion). These statements also constitute predictions of future events, which are quintessential opinions. See McCarthy § 27-109, at 27-256 n.15. Similarly, characterizing other products as “inferior” is simply the flip side of calling Speedo’s product superior. nSight, Inc. v. PeopleSoft, Inc., No. 04-3836, 2005 WL 1287553, \*1 (N.D. Cal. June 1, 2005) (dismissing as puffing false advertising claim that competitor’s services were “inferior”).

Moreover, these statements appeared in articles, the subject of which was the performance of the LZR Swimsuit and the records set by athletes wearing the suit. There was significant public debate at that time whether the suit technology should be legal. In the context of that debate, Coach Schubert’s opinions are protected by the First Amendment.

• ¶¶ 16(i), 16(j): Schubert stated: “My advice to athletes is, ‘You have a black and white decision – the money [which comes from swimmers sticking with their current sponsorship deal] or the Gold Medal.’ And it’s going to be a real test as to what choice they make. There is one manufacturer that’s put millions into research while others are more into fashion.” Coach Schubert also stated: “The other [swimwear] companies just haven’t put the effort in. They’ve focused more on fashion than performance. They need to get with it. It’s simple.”

TYR does not (and cannot) dispute that Speedo has put millions into research, but rather claims that the statements that others “are more into fashion” and must “get with it” are false. (Compl. ¶ 23.) These statements do not plead actionable false advertising because there is no measurable way to determine whether Speedo’s competitors are “more into fashion” than Speedo, or even what that means. How “into fashion” a company might be constitutes pure opinion because it depends on

1 subjective conclusions rather than provable facts. See Hofmann Co. v. E. I. Du Pont  
 2 de Nemours & Co., 202 Cal. App. 3d 390, 397 (Cal. Ct. App. 1988) (are not capable  
 3 of proof in terms of truth or falsity) (internal quotation omitted), abrogated On other  
 4 grounds in Kahn v. Bauer, 232 Cal.App.3d 1599, 1606-07, 284 Cal. Rptr. 244  
 5 (1991).

6 **B. TYR Admits That Schubert's Statements Are Not**  
 7 **Actionable.**

8 TYR alleges in its Complaint that all the foregoing statements made by Coach  
 9 Schubert are otherwise non-actionable "marketing claims made in the hopes [sic] of  
 10 selling equipment." (Compl. ¶ 17.) Because these statements are made by the  
 11 Olympic swim team coach, and because his relationship with Speedo supposedly  
 12 was not disclosed, TYR claims that they are transformed into actionable statements  
 13 of fact. (Id. ¶¶ 17, 22.) TYR's theory fails for two reasons.

14 First, facts subject to judicial notice demonstrate that Schubert's relationship  
 15 with Speedo is well known. Many of the news articles from which TYR has  
 16 extracted the supposedly false statements by Schubert also contain quotes by  
 17 Schubert disclosing his role as a paid consultant for Speedo. (Req. For Jud. Notice  
 18 Ex. A.) Other articles and promotional materials disclose that Schubert was  
 19 involved in the development of the LZR swimsuit. (Id. Exs. C, D.)

20 Second, the mere fact that Schubert, by virtue of his position, is viewed as a  
 21 person of authority, is legally irrelevant; his statements are still non-actionable  
 22 opinions. A virtually identical argument was considered and rejected by Judge Sand  
 23 in Gordon & Breach Sci. Publishers, S.A. v. Am. Inst. of Physics, 859 F. Supp.  
 24 1521, 1523-24, 1542 & n.9 (S.D.N.Y. 1994) (granting motion to dismiss). The  
 25 plaintiff competed with the defendant in the publication of science journals. Id. at  
 26 1523. The defendant published articles comparing scientific journals by price and  
 27 value, ranking its own journals at the top of the list and the plaintiff's at or near the  
 28

1 bottom. Id. The plaintiff argued that the articles were false advertising in part  
 2 because the author's interested position as an officer of the defendant was not  
 3 disclosed, "thus creating the misleading impression that [the author] had acted as an  
 4 unaffiliated and unbiased scientist in preparing his surveys." Id. at 1542 n.9. The  
 5 court rejected this theory, holding that "[f]ailure to disclose a conflict of interest of  
 6 this nature, however, does not give rise to a Lanham Act claim." Id. at 1542.

7 TYR's theory of Schubert's supposedly "undisclosed" position is  
 8 indistinguishable from the plaintiff's theory in Gordon & Breach. They both  
 9 claimed that statements otherwise immune from false advertising liability somehow  
 10 lose that immunity because the speaker has an undisclosed conflict of interest. As  
 11 Gordon & Breach makes clear, however, an undisclosed conflict does not give rise  
 12 to a Lanham Act violation. Taken together with TYR's own admission that Coach  
 13 Schubert's statements are all puffing, the motion to dismiss should be granted as to  
 14 all of Coach Schubert's alleged statements.

### 15 **C. Speedo's Promotional Materials Are Not Actionable.**

16 In addition to the statements made by Schubert, TYR also claims that certain  
 17 Speedo promotional materials constitute false advertising. As is shown below, they  
 18 too are not actionable.

19 • ¶ 29 Speedo distributed a promotional document to its team dealers  
 20 purporting to be "a very thorough analysis of the suit statistics from the Nationals  
 21 three weeks ago," that shows "how we [SPEEDO] continue to dominate at the  
 22 Senior National Level." TYR alleges that the statement is literally false because  
 23 Speedo's analysis was not "thorough" in that it did not include, "among other  
 24 inaccuracies", results from the 1650 yard freestyle. No other inaccuracies are  
 25 identified.

26 The statement that Speedo's analysis was very "thorough" is puffing and  
 27 opinion. Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995) (holding book  
 28

1 author's "general assertion that the research he conducted was 'thorough[ ]' is mere  
2 'puffing' and therefore, not actionable"). Similarly, the second statement – that  
3 Speedo continues to "dominate" – is unquestionably puffing.

4 • ¶ 30 TYR alleges that Speedo sent team dealers promotional materials  
5 that "understated the number of athletes wearing TYR equipment (thus overstating  
6 the percentage of athletes wearing SPEEDO)" in certain races. TYR claims that this  
7 constitutes literal falsity.

8 This statement falls outside the scope of the Lanham Act because it is not  
9 about the characteristics or qualities of a product. Instead, it is merely a recitation of  
10 who wore what brand of equipment during selected races. Tire Kingdom, Inc. v.  
11 Morgan Tire & Auto, Inc., 915 F. Supp. 360, 366 (S.D. Fla. 1996) (holding  
12 advertisement not actionable because it "does not pertain to the nature, quality,  
13 characteristics, or geographic origin of the Defendants' product"). Thus, the false  
14 advertising provision of the Lanham Act does not cover reporting (even if  
15 inaccurate) of sporting events, but rather false statements of fact about  
16 characteristics or qualities of a specific product.

17 • ¶¶ 31, 32 TYR alleges that Speedo accurately reports that "a large  
18 majority of swimmers who recently have won meets or set records have done so in  
19 the Speedo equipment." TYR claims, however, that this statement is misleading  
20 because "SPEEDO neglects to mention that a majority of the elite swimmers who  
21 participated in the relevant events were in SPEEDO equipment." TYR also alleges  
22 that "SPEEDO fails to mention that it sponsors a disproportionately high number of  
23 those athletes who are at the highest levels (such as Michael Phelps) and are  
24 therefore the likely candidates to set meet or world records."

25 Although some courts recognize that an advertisement may be misleading "by  
26 omission," the statements at issue must still pertain to the characteristics of a  
27 product. Tire Kingdom, 915 F.Supp. at 366. This statement does not relate to the  
28

1 characteristics of a product, but rather concerns only who wore Speedo equipment.  
 2 Thus, it is not covered by the Lanham Act.

3 Moreover, TYR's claim that Speedo cannot distribute truthful information  
 4 unless it first tells its customers – elite swimmers – that it represents most elite  
 5 swimmers is illogical and not supported by any authority. Putting aside that this is  
 6 widely known information, its absence does not change the meaning of the message.  
 7 TYR is free to respond to these statistics in the marketplace with its own  
 8 interpretation of their significance, but it cannot restrain Speedo's ability to  
 9 accurately report race results.

10 As the foregoing demonstrates, TYR has not met its burden to allege a single  
 11 statement that constitutes false advertising. Hence, the Lanham Act claim should be  
 12 dismissed.

13 **V. THE SIXTH CLAIM FOR TORTIOUS INTERFERENCE WITH**  
 14 **CONTRACTUAL RELATIONS SHOULD BE DISMISSED.**

15 TYR asserts a claim for tortious interference with contract based on its  
 16 allegation that co-defendant, swimmer Erik Vendt, left TYR for Speedo “[a]s a  
 17 direct and proximate result of the actions” of the other defendants. (Compl. ¶¶ 64-  
 18 65.) At best, TYR has alleged that Vendt has determined that the LZR Swimsuit is  
 19 superior and opted to use it in lieu of TYR's product. TYR's allegations do not  
 20 support a tort claim because, as a competitor, Speedo is entitled to manufacture and  
 21 sell the best product.

22 California follows the multifactor Restatement test for the competitor's  
 23 privilege. See 5 B.E. Witkin, Summ. Cal. Law, Torts § 756, at 1094-95 (10th ed.  
 24 2005). In determining whether an actor's conduct in intentionally interfering with a  
 25 contract is improper, consideration is given to the following factors: (a) the nature  
 26 of the actor's conduct; (b) the actor's motive; (c) the interests of the contract with  
 27 which the actor's conduct interferes; (d) the interests sought to be advanced by the  
 28



1 actor; (e) the social interests in protecting the freedom of action of the actor and the  
 2 contractual interests of the other; (f) the proximity or remoteness of the actor's  
 3 conduct to the interference; and (g) the relations between the parties. *Id.* These  
 4 factors weigh heavily in favor of application of the privilege. The nature of  
 5 Speedo's conduct and its motives support a finding of privilege because Speedo's  
 6 sponsorships are all lawful. There can be no bad motive to enter into lawful  
 7 sponsorship contracts.

8 The relative interests of the parties and society also support application of the  
 9 privilege. TYR's interests should be to permit our Olympic athletes to succeed in  
 10 whatever equipment they elect to use. Speedo's interest is in producing the best suit  
 11 possible and making it available to athletes who choose to use it. In terms of social  
 12 interests, Speedo and TYR are both in the business of marketing the best possible  
 13 swimwear to elite athletes, who are free to choose whatever equipment they believe  
 14 will provide them with the best chance of success.

15 Speedo's alleged conduct is remote from the purported interference. TYR  
 16 does not allege Speedo interfered with Vendt's contract. To the contrary, TYR  
 17 claims that Speedo should be liable for Vendt's breach because Coach Schubert  
 18 expressed his opinion that Speedo's LZR Swimsuit is a better product.

19 Finally, the relationship between the parties supports a finding of privilege.  
 20 Speedo and TYR are direct competitors marketing equipment to sophisticated elite  
 21 athletes. Accordingly, the privilege of fair competition should apply.

22 **VI. THE SEVENTH CLAIM FOR TORTIOUS INTERFERENCE WITH**  
 23 **PROSPECTIVE ECONOMIC ADVANTAGE SHOULD BE**  
 24 **DISMISSED.**

25 To allege a cause of action for tortious interference with prospective economic  
 26 advantage, a party must demonstrate the existence of a specific economic  
 27 relationship between itself and an identifiable third party "containing the probability  
 28

1 of future economic benefit.” Blank v. Kirwan, 703 P.2d 58, 39 Cal. 3d 311, 330  
 2 (Cal. 1985) (affirming the sustaining of demurrer). A party cannot maintain a claim  
 3 where its alleged “existing relationship [is] with . . . speculative future [customers].”  
 4 Roth v. Rhodes, 30 Cal. Rptr. 2d 706, 25 Cal. App. 4th 530, 546 (Cal. Ct. App.  
 5 1995); see also Westside Center Assocs. v. Safeway Stores 23 Inc., 49 Cal. Rptr. 2d  
 6 793, 42 Cal. App. 4th 507, 527 (Cal. Ct. App. 1996); Asia Investment Co. v.  
 7 Borowski, 184 Cal. Rptr. 317, 133 Cal. App. 3d 832, 841 (Cal. Ct. App. 1982) (no  
 8 valid claim where real estate developer’s only “business relationship” was with a  
 9 class of-as-yet unknown purchasers).

10 Westside Center is particularly instructive. There, the plaintiff strip mall  
 11 owner sued the defendant anchor tenant for intentionally interfering with plaintiff’s  
 12 ability to sell the property to potential buyers. Id. at 523. The plaintiff could not  
 13 demonstrate, however, the existence of an actual relationship between itself and  
 14 some specifically identifiable third party that would have resulted in future economic  
 15 advantage but for the defendant’s actions. Id. at 527. Accordingly, the court  
 16 rejected the plaintiff’s “interference with the market” theory because there was no  
 17 indication of an “existing relationship with an identifiable buyer.” Id. at 523, 527.  
 18 The plaintiff’s allegations were “at most a hope for an economic advantage and a  
 19 desire for future benefit.” Id. at 524 (quotation omitted).

20 TYR’s allegations are virtually identical to those in Westside Center. TYR  
 21 alleges only that it “has an economic relationship with coaches, team dealers and  
 22 athletes through which TYR was likely to benefit economically in the future.”  
 23 (Compl. ¶ 68.) These conclusory and self-serving statements fall squarely within the  
 24 “interference with the market” theory that California courts have rejected. Rather  
 25 than identify a specific person or persons that TYR would have benefited from in the  
 26 absence of Speedo’s alleged conduct, TYR makes blanket statements that Speedo  
 27 drew broad classes of potential customers – coaches, team dealers, and athletes –  
 28



1 away from TYR. TYR's allegations amount to nothing more than a "speculative  
 2 expectation that a potentially beneficial relationship will eventually arise." Westside  
 3 Center, 42 Cal. App. 4th at 524. This is insufficient to support a cause of action for  
 4 interference with prospective economic advantage. Accordingly, the sixth cause of  
 5 action for tortious interference with prospective economic advantage should be  
 6 dismissed.

## 7 **VII. THE EIGHTH CLAIM FOR TRADE LIBEL SHOULD BE** 8 **DISMISSED.**

9 TYR purports to assert a claim for "trade libel" under California law. Trade  
 10 libel is defined as "an intentional disparagement of the quality of property, which  
 11 results in pecuniary damage to plaintiff." Erlich v. Etner, 36 Cal. Rptr. 256, 224 Cal.  
 12 App. 2d 69, 73 (Cal. Dist. Ct. App. 1964). Because the statements identified by  
 13 TYR are all puffery and opinion, the trade libel claim fails for the same reasons as  
 14 the purported false advertising claim. nSight, Inc., 2005 WL 1287553, at \*2  
 15 (dismissing trade libel claim as puffing for same reasons as false advertising claims)  
 16 (citing Coastal Abstract, 173 F.3d at 730-31 (holding "puffery" by plaintiff's  
 17 competitor not actionable under California defamation law)).

18 In addition, TYR fails to satisfy the strict pleading requirement for special  
 19 damages applicable to trade libel cases. A trade libel plaintiff must allege the  
 20 specific sums lost. Erlich, 224 Cal. App. 2d at 74-75; Wright v. Coules, 87 P. 809, 4  
 21 Cal. App. 343, 347 (Cal. Dist. Ct. App. 1906) (sustaining demurrer for failure to  
 22 plead specific amount; allegation that damages were "at least the sum of \$3000" not  
 23 specific enough); Levy, Golden & Sacks, Cal. Business Torts, § 40.75 (Bender  
 24 1999) (plaintiff must "allege and prove the specific sum lost when the specific  
 25 purchaser refused to trade"). TYR alleges only that it has "suffered damages in an  
 26 amount to be proved at trial." (Compl. ¶ 78.) TYR's failure to allege a specific  
 27 amount of supposed loss subjects this claim to dismissal.

**VIII. THE NINTH CLAIM FOR UNFAIR BUSINESS PRACTICES SHOULD BE DISMISSED.**

As demonstrated above, the Complaint does not state a claim under the Sherman or Cartwright Acts. Nor does it allege claims for trade libel or false advertising. Finally, Plaintiff cannot save its Unfair Business Practices claim by alleging “unfair” conduct because Speedo’s contracts with the other defendants are legal and well accepted in amateur athletics. TYR’s position that it is somehow “unfair competition” for Speedo to exclusively sponsor US Swimming is absurd. Far from being unfair, corporate sponsorship of U.S. national teams is absolutely legal and commonplace in the market. See e.g., Fed’n Internationale De Football Ass’n v. Nike, Inc., 285 F. Supp. 2d 64, 66 (D.D.C. 2003) (“Nike is . . . the sponsor of the U.S. Women’s National Soccer Team, which won the 1999 World Cup and is playing in the current competition. Nike provides the team’s uniforms, which prominently bear the company’s famous Swoosh logo, as well as other equipment and clothing.”). The propriety of corporate sponsorship of national teams is beyond dispute.

In any event, the law is clear that Section 17200 does not give parties a vehicle to complain about the fairness of contracts. Gregory v. Albertson’s, Inc., 128 Cal. Rptr. 2d 389, 104 Cal. App. 4th 845, 856 (Cal. Ct. App. 2002) (demurrer to Section 17200 claim sustained and affirmed where the relief sought had the effect of putting “the court in the untenable position of making or approving commercial decisions without clear guidelines.”); Samura v. Kaiser Found. Health Plan, Inc., 22 Cal. Rptr. 2d 20, 17 Cal. App. 4th 1284, 1299 n.6 (Cal. Ct. App. 1993) (invoking the term “unfair” under Section 17200 “does not give the courts a general license to review the fairness of contracts”).

1 Since TYR's claims boil down to an allegation that Speedo's exclusive  
2 sponsorship contract with US Swimming is unfair to Speedo's competitors, there can  
3 be no "unfair, unlawful, or fraudulent" practices necessary under Section 17200.

4 The claim is also procedurally defective as the prayer seeks recovery of  
5 damages (Compl. ¶ 82; Prayer for Relief ¶ 5), which are not available under Section  
6 17200. Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266 (Cal. 1992)  
7 (damages not recoverable).

8 **IX. THE TENTH CLAIM FOR INJUNCTIVE RELIEF SHOULD BE**  
9 **DISMISSED.**

10 Injunctive relief is a remedy, not a cause of action. See Reuben H. Donnelley  
11 Corp. v. Mark I. Mktg. Corp., 893 F. Supp. 285, 293 (S.D.N.Y. 1995) (granting  
12 motion to dismiss on claim for injunctive relief because "there is no 'injunctive'  
13 cause of action"); Noah v. Enesco Corp., 911 F. Supp 305, 307 (N.D. Ill. 1995) ("An  
14 injunction is a remedy, not a cause of action."). TYR must allege which of its  
15 defective claims might support this remedy.

16 **X. CONCLUSION.**

17 For the foregoing reasons, Defendants respectfully request that the Court  
18 dismiss each claim for relief alleged in the Complaint.

19 Dated: September 15, 2008

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